

DATE: December 22, 1986

SUBJECT: Outside Counsel for the Civil Service
Commission

REQUESTED BY: Rich Snapper, Personnel Director

PREPARED BY: John M. Kaheny, Deputy City Attorney

QUESTION PRESENTED

By memorandum dated December 3, 1986, you asked this office for a written opinion concerning our previous oral advice to the Civil Service Commission regarding its ability to retain outside counsel for its current Charter Sec. 128 investigation. That advice was rendered by Assistant City Attorney Curtis Fitzpatrick on November 19, 1986.

CONCLUSION

The City Attorney, as the chief legal advisor of The City of San Diego and all of its departments pursuant to Charter Sec. 40, is willing, able and qualified to provide the Civil Service Commission with legal advice in the matter being investigated. Under the present facts, there is no necessity for the City Council to employ an additional attorney to represent the Civil Service Commission.

BACKGROUND

During a recent hearing before the Civil Service Commission, Mr. Patrick Thistle, attorney at law, requested that the office of the City Attorney be recused from advising the Commission during the current Charter Sec. 128 investigation and that outside counsel be retained by the Commission. Mr. Thistle based his request on his interpretation of Civil Service Comm. v. Superior Court, 163 Cal.App.3d 70, 209 Cal.Rptr. 159 (1984). He stated that because he had filed with the Commission formal written charges of misconduct against an unclassified member of the City Attorney's office as part of this investigation, that the entire City Attorney's office should be removed from advising the Commission. He also indicated that because the Commission

was requested to investigate how City departments implement certain civil service rules, the office of the City Attorney must be removed because it also advises these departments. In response, Curtis Fitzpatrick, Assistant City Attorney, indicated to the Commission that the City Charter does not authorize the Civil Service Commission to retain outside counsel and that the City Council only may retain additional counsel when it is necessary under the express provisions of Charter Sec. 40. He also indicated that under the present facts, such expenditure of funds was not necessary because the City Attorney's office is

ready, willing and able to represent the Civil Service Commission in this investigation. He informed the Commission that the investigation of charges of misconduct against an unclassified member of the City Attorney's office was not within the Civil Service Commission's jurisdiction and that the City Attorney is charged under the Charter to represent the City and all of its departments and commissions. The Commission then publicly voted to request that the City Council authorize the expenditure of funds to retain outside counsel for the Commission for the purpose of this Charter Sec. 128 investigation.

ANALYSIS

The City Attorney of The City of San Diego, is an independent elected official of the government of The City of San Diego, whose duties, powers and responsibilities are set forth in section 40 of the Charter of The City of San Diego. That section reads in part:

... A City Attorney shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter. The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties.

The City Attorney shall appoint such deputies, assistants, and employees to serve him, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter. It shall be his duty, either personally or by such assistants as he may designate, to perform all services incident to the legal

department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; ...

The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected

with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments. (Emphasis added.)

It should be noted initially that the authority of the City Council to employ additional attorneys exists only when it is necessary to do so. The case law in California is very helpful in determining when such action is necessary. Seventy years ago the Civil Service Commission of San Francisco retained outside counsel to defend itself against a lawsuit which arose when it disregarded the advice of the city attorney and took action in accordance with its own judgement. Legal proceedings were commenced by a third party in the superior court against the commission to determine the legality of the commission's actions. Although the commission had not followed the advice of the city attorney, he was ready, willing and able to defend the commission in the lawsuit. The commission, however, refused his offer. When the commission sent the bill for the retained attorney to the city auditor, the auditor refused to pay the bill. Eventually, a writ of mandamus was issued by a trial court commanding the auditor to pay the amount. However, upon appeal, the appellate court in *Rafael v. Boyle*, 31 Cal.App. 623 (1916), analyzed a provision of the San Francisco Charter similar to that of section 40 of the Charter of The City of San Diego and stated:

This express provision clearly indicates an intention that the City Attorney should handle all the legal work of the various departments of the city government, except

where a special provision is made for additional counsel. The manifest intention of the framers of the Charter in the adoption of this provision was to systematize the conduct of the City's legal business and to limit the power of the authorities to incur expenditures for this character of service. ... The Charter having provided a City Attorney upon whom the Board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the Board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to

render those services which is the duty of the City Attorney to perform. *Denman v. Webster*, 139 Cal. 452, 73 P. 159; *Merrian v. Barnum*, 116 Cal. 619, 48 P. 727.

More recently, another court in *Jaynes v. Stockton*, 193 Cal.App.2d 47, 54, 14 Cal.Rptr. 49 (1971) explained this same principle in greater detail.

In many cases, the courts of the state have expressly stated or impliedly recognized the rule that a public agency created by statute may not contract and pay for services which the law requires a designated public official to perform without charge, unless the authority to do so clearly appears in the powers expressly conferred upon it (citations omitted) or unless the services required are unavailable for reasons beyond the agency's control such as inability, refusal or disqualification of the public official to act. (Citations omitted.) This rule is based upon sound principles. The law will not indulge in implications that a public agency has the authority to expend public funds which it does not need to spend; that it has authority to pay for services which may be obtained without payment; or that it may duplicate an expenditure for service which the taxpayers have already provided. (Citations omitted, emphasis added.)

This office firmly believes that the retention of outside counsel is not necessary under the present facts because the City

Attorney's office is able, willing and qualified to represent the Civil Service Commission.

We must state our disagreement with Mr. Thistle's argument that the *Civil Service Com. v. Superior Court* case holds that a deputy city attorney cannot represent the Civil Service Commission in an advisory capacity under any circumstance. We need only state at this time that Mr. Thistle has made this argument on numerous previous occasions before the Civil Service Commission. This office has responded in writing and has stated what we believed to be the proper holding of that case. Memorandum of Law dated April 30, 1986 to Rich Snapper, Personnel Director from City Attorney, Legal Representation Before the Civil Service Commission provided by the office of the City Attorney. If Mr. Thistle believes his view of that case to be

true and correct he may seek an available and appropriate remedy from the superior court.

We believe that the filing of written charges with the Civil Service Commission against a deputy city attorney, a "member of the unclassified service," does not disqualify the City Attorney's office from representing the Civil Service Commission, because the Commission clearly has no authority under Charter Sec. 128 to investigate written charges of misconduct against a member of the unclassified service. Therefore, no conflict of interest exists.

The argument that a conflict of interest exists because the City Attorney's office advises other departments of The City of San Diego is clearly frivolous. Mr. Thistle gives no facts and cites no authority for this proposition which, if taken seriously, would render the City Attorney's office unable to carry out its duties under the Charter of The City of San Diego. Extending his theory to its illogical conclusion, the City Attorney's office would only be left with the power and duty to represent itself, the Council, and each of the departments of the City, leaving all the various commissions and boards with the requirement to hire its own independent counsel.

This is not to state, however, that there may never be a time when this office may not be available to advise the Civil Service Commission in a specific situation. Certainly the facts in Civil Service Com. v. Superior Court, where a deputy county counsel advised the county's civil service commission on a particular matter and then the same deputy county counsel represented the county in a lawsuit arising out of his advice to the commission, warrants disqualification of counsel. Nor do we doubt that whenever a conflict of interest question arises, that it must be

resolved by thoughtful judgment on a case by case basis. If, after a thorough analysis of the issue, this office believes that legal cause exists for disqualification, we will advise the City Council to take appropriate action. However, absent a self-recusal or a writ of mandamus issued by the superior court, this office stands ready, willing and able to give legal advice to The City of San Diego in accordance with Charter Sec. 40.

SUMMARY

Based on the above facts and analyses, we believe that there is no legal necessity for the City Attorney's office to be recused from representing the Civil Service Commission of The City of San Diego in the current Charter Sec. 128 investigation. As long as the office of the City Attorney is ready, willing and qualified to represent the Civil Service Commission, we believe that the Charter requires us to do so and that the Council may

only expend funds to pay for outside counsel when it becomes necessary because of the inability, refusal or disqualification of the City Attorney.

Respectfully submitted,
JOHN W. WITT, City Attorney

By
John M. Kaheny
Deputy City Attorney

JMK:smm:920.11:(x043)

LO-86-8

APPROVED:

JOHN W. WITT
City Attorney